Supreme Court, U. S.
FILED
MAR 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79 1128

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Respondents

V.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER'S HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,

Petitioners.

PETITIONERS' REPLY BRIEF

MICHAEL J. GREELY,
Attorney General
State of Montana
Capitol Building
Helena, Montana 59601

Of Counsel:

CLAYTON R. HERRON
Special Assistant Attorney General
P. O. Box 783
Helena, Montana 59601

F. WOODSIDE WRIGHT
Special Assistant Attorney General
Department of Fish and Game
Capitol Station
Helena, Montana 59601

URBAN L. ROTH
Special Assistant
Attorney General
1341 Harrison Avenue
Butte, Montana 59701

JAMES E. SEYKORA
Attorney at Law
Kronmiller Building
Hardin, Montana 59034

DOUGLAS Y. FREEMAN
Attorney at Law
10 West Fourth Street
Hardin, Montana 59034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79 1128

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,
Respondents

v.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

PETITIONERS' REPLY BRIEF

MICHAEL J. GREELY,
Attorney General
State of Montana
Capitol Building
Helena, Montana 59601

Of Counsel:

CLAYTON R. HERRON
Special Assistant Attorney General
P.O. Box 783
Helena, Montana 59601

F. WOODSIDE WRIGHT
Special Assistant Attorney General
Department of Fish and Game
Capitol Station
Helena, Montana 59601

URBAN L. ROTH
Special Assistant
Attorney General
1341 Harrison Avenue
Butte, Montana 59701

JAMES E. SEYKORA
Attorney at Law
Kronmiller Building
Hardin, Montana 59034

DOUGLAS Y. FREEMAN
Attorney at Law
10 West Fourth Street
Hardin, Montana 59034

PETITIONER'S REPLY BRIEF

I.
THE LOWER COURT'S HOLDING ON RIVER OWNERSHIP CONFLICTS WITH ESTABLISHED LAW AND IS OF VAST IMPORTANCE TO NUMEROUS STATES

Respondent, United States, opposes review because the "questions presented here turn on the special facts of the case" and present no conflict in decisions. (Resp. 8) Thus, Respondent contends that a purely parochial question of "modest" dimensions is raised. (Resp.9) These arguments do not withstand close scrutiny.

The argument that Reservation boundaries refer to the mid-channel of the Yellowstone River or that the Big Horn was entirely and still partially remains within the boundaries of the Crow Reservation does not render the question presented here a purely local one. Numerous other treaties created reservations using similar descriptions encompassing navigable waters.[1] Mud Lake was entirely within the boundaries of the Red Lake Reservation studied in *United States v. Holt State Bank*, 270 U.S. 49, 52 (1926), and portions of the Puyallup River bisect the Puyallup Reservation. *Puyallup Tribe, Inc. v. Washington Game Department*, 433 U.S. 165, 174, n. 12 (1977).

[1] See e.g., Treaty with the Flathead, 1855, II Kapp. (most recent printing) 722; Treaty Umpqua and Kalapuya, 1854, II Kapp. 657, 658; Treaty with the Wallawalla, et al., 1855, II Kapp. 694; Treaty with the Nez Perces, 1855, II Kapp. 702, 703.

Respondent also relies upon "boilerplate" treaty provisions which are in a host of other Indian treaties. (Pet. 13, n. 22; Amici 4, n. 5) The Chippewa were guaranteed "permanent homes," but this fact was insufficent to overcome the *constitutional presumption* that title to Mud Lake passed to the State. (Treaty with the Chippewas, II Kapp., 686, Art. 2; *Holt, supra,* 55) The Puyallup and other tribes were extended guarantees similar to the Crow (Amici 4), but this Court implicitly disparaged their importance in *Puyallup Tribe, Inc. v. Washington State Game Department,* 435 U.S. 165, 174, n. 12 (1977).

Respondent also argues that the lower court's ruling is consistent with *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970), and compares the Crow Reservation, in which the Tribe had expressly relinquished their sovereignty to the United States in accepting a "dependent" status (Pet.App.E, Arts. 1, 6, 7, 9, 10, pp. 88, *et seq.*), to that of the Choctaw who, for most purposes, were an "independent country" (*Atlantic and Pacific Railroad Co. v. Mingus,* 165 U.S. 413, 435-436 (1977)). Obviously, the comparison is inapt.

Sovereignty and ownership of navigable waters are inextricably linked (*United States v. Oregon,* 295 U.S. 1, 14 (1935); cf. *Shively v. Bowlby,* 152 U.S. 1 (1894)), and there are but two sovereigns—the United States and the individual states. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 211 (1978). The Crow Tribe does not possess those traits of sovereignty upon which ownership of navigable

waters is dependent. Moreover, this Court early recognized that the semi-independent status of the Indian was "temporary." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 593 (1832) (Justice McLean concurring). Indeed, this Court, interpreting the Crow Treaty, said that it contemplated "ultimate complete ownership" of reservation land by "individual Indians." *United States v. Powers*, 305 U.S. 527,533 (1938).

Acquisition of the Louisiana Territory, within which the reservation lies, was conditioned upon its inhabitants being "incorporated in the Union *** as soon as possible,"[2] and Congress quickly acted to guarantee to all of its citizens the full navigation of waters within that territory.[3] "Use and occupation" of the land was guaranteed under the Crow Treaty (Pet. App. E, 89, Art. 2), but the fee, unlike *Choctaw*, was reserved—and like *Holt* passed to the state upon admission into the Union on an "equal footing" with her sister states. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

The vast importance of river status in this case is focused upon in the amici brief filed on behalf of Washington and Idaho in which seven other states join. The decision reached by the lower court, if not corrected, will spawn a plethora of identical lawsuits which will threaten long-standing land titles, state projects and state administrative practices

[2] Treaty with France, April 30, 1803, proclaimed October 21, 1803, 8 Stat. 200; compare *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1884).

[3] 33 U.S.C. §11 (Act of March 3, 1811).

throughout the Eighth, Ninth and Tenth Circuits.[4] The fact that many of the treaties establishing reservations in these circuits use language similar or identical to the Crow Treaty makes the question presented here one worthy of review.

II.
THE FEDERAL CHOICE-OF-LAW RULE EXTENDS RIPARIAN LAND OWNERSHIP TO LOW WATER

Respondent misconstrues this Court's holding in *Wilson v. Omaha Indian Tribe,* —U.S.—, 61 L.Ed 2d 153 (1979), in arguing that the state is attempting to alter the boundary of the federal domain. (Resp. 12-13) In *Wilson,* this Court articulated the Federal Choice-of-Law Rule which applies state law—as the federal rule—in measuring the extent of the federal grant. *Wilson, supra,* 61 L.Ed.2d 169-172.

If indeed the United States still owns the fee to the riverbed in trust for the Tribe, then following Respondent's argument, it is free to alienate all or any part of that bed. (Resp. 8) If the state owns the riverbed, this question is moot. If the state does not own the riverbed, then it stands in the shoes of any other federal patentee expecting to receive all those "incidents of *** ownership" which are securely attached to the patent by federal law. *Wilson, supra,* 61 L.Ed.2d 169, n. 18. In this instance, those rights,

[4] There are 153 Indian reservations within the Ninth Circuit and 90 such reservations within the Eighth and Tenth containing millions of acres of fee lands. *Federal and State Indian Reservations and Indian Trust Areas,* U.S. Dept. of Commerce, G.P.O. 1974.

by virtue of the Federal Choice-of-Law Rule laid down in *Wilson*, are measured by state law and extend title to low water.

III.
ABSENT EXPRESS CONGRESSIONAL SANCTION, THE CROW TRIBAL RESOLUTION IS AN INVALID ASSUMPTION OF AUTHORITY

Respondent, arguing from this Court's holding in *Williams v. Lee*, 358 U.S. 217 (1959), and *United States v. Mazurie*, 419 U.S. 544 (1975), contends that the Tribe possesses authority to regulate non-Indian activity on non-Indian land. Neither decision supports this thesis.[5]

No question is presented in this case of state action infringing "on the rights of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee, supra*, at 222; cf. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, n. 9. Petitioners have expressly conceded they have no authority to regulate Indian hunting and fishing within the reservation. Nor is this a case in which regulation of non-Indians within a reservation has been expressly sanctioned by Congress. *United States v. Mazurie, supra*, 554-555; see e.g., 18 U.S.C. §1161. In the face of the limited congressional action addressing hunting and fishing on "Indian" lands (18 U.S.C. §1165)

[5] A similar argument was advanced by the United States in *Oliphant, supra*, pp. 15-16, Brf. United States, but rejected for the same reasons it should be rejected here.

and this Court's recognition of but two sovereigns (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978)), it is difficult to conceive of a source from which the Tribe can draw its authority to control non-Indian activity on non-Indian land. The quasi sovereign status of the Tribe is, of course, the source which nourishes its authority to govern its tribal members. *United States v. Wheeler*, 435 U.S. 313 (1978). The Treaty did not materially diminish that authority. By the same token, it is the dependent status imposed upon the Tribe by the Treaty which is totally inconsistent with Indian authority over non-Indians absent congressional sanction. Cf. *Oliphant, supra*, 206-208, and *United States v. Wheeler, supra*, 435 U.S. 326. The lower court's unprecedented disregard of this principle merits review.[6]

[6] In the circuits, courts have reached totally disparate results post-*Oliphant*. In *Merrion*, et al. v. *Jicarilla Appache Tribe*, et al., No. 78-1154 consolidated on appeal with *Amoco Prod. Co.*, et al. *v. Jicaquilla Appache Tribe*, et al., No. 78-1251 (10th Cir. En Banc, February 22, 1980), the Tenth Circuit, despite *Oliphant*, invested an Indian Tribe with tax authority over non-Indians. In *Confederated Salish and Kootenai Tribes* v. *Namen*, CV No. 2343 (D. Mont., September 19, 1979), 6 Indian Law Reporter F-161, 169-175, Judge William Jameson in a memorandum decision, pp. 44-58, citing *Oliphant* and *Wheeler*, held an Indian tribe does not possess civil regulatory power over a non-Indian's use of fee land within a reservation. A similar result was reached in *Trans-Canada Enterprises, Ltd.* v. *Muckleshoot Indian Tribe*, No. CV 77-882-M (W. D. Wash., July 27, 1978), 5 Indian Law Reporter F-153. These conflicting decisions need to be rationalized.

RESPECTFULLY SUBMITTED this 13th day of March, 1980.

MICHAEL GREELY, Attorney General
State of Montana

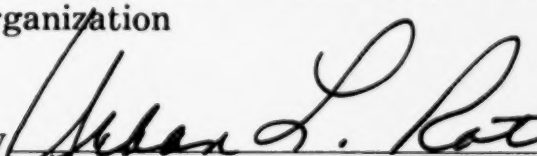
CLAYTON R. HERRON
Assistant Attorney General

F. WOODSIDE WRIGHT,
Assistant Attorney General

URBAN L. ROTH,
Assistant Attorney General

JAMES E. SEYKORA,
Attorney for Petitioner, Big Horn Rod and Gun Club

DOUGLAS Y. FREEMAN,
Attorney for Petitioner, Citizens Rights Organization

By 

Attorney for the Petitioner,
State of Montana
1341 Harrison Avenue
Butte, Montana 59701